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Review of International Organizations and International Dispute Settlement edited by Laurence Boisson de Chazournes, Cesare Romano, and Ruth Mackenzie

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York University, Adam Roberts of Oxford University, and the French jurist and politician Robert Badinter—could not agree on the specifics of a criteria-based approach.

One quibble: while the editors have done a terrific job in assembling an interesting, varied, and accomplished mix of essays, they make no effort to sort through the conflicting views advanced and to provide the reader with a set of overall conclusions. I suspect that the editors harbor strong views on the subject—including a certain impatience with textual legal arguments—but it would nevertheless have been interesting and valuable to see the results of such an effort.

Overall, this volume is an excellent one, and the reader of these lines will have detected how much I enjoyed even those chapters I partially disagreed with.

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International Organizations and International Dispute Settlement: Trends and Prospects. Edited by Laurence Boisson de Chazournes, Cesare Romano, and Ruth Mackenzie. Ardsley NY: Transnational Publishers, 2002. Pp. xxiii, 283. Index. $85, cloth; $45, paper.

Since the invasion of Iraq, a great deal of the ongoing discussion concerning international institutions has focused on the implications for the future efficacy of the UN Security Council and also, more generally, of the United Nations itself. To judge from the popular press even before the standoff over Security Council approval of military action in Iraq, multilateralism was already at a low ebb, largely thanks to a chilly attitude on the part of the United States. While this heated debate addresses critical questions of international law and policy in the new millennium, one unfortunate consequence has been to distract attention from the important, if perhaps less widely appreciated, positive developments analyzed by this book.

As suggested by its title, *International Organizations and International Dispute Settlement* takes on two subject matter areas often considered distinct—both of which are rapidly changing—and examines the dynamic interaction between them. The present volume memorializes twelve contributions to a conference held in 2001 by the Law Faculty of the University of Geneva and the Project on International Courts and Tribunals.

Professor Vera Gowland-Debbas's contribution on the relationship between the Security Council and the new International Criminal Court (ICC) is the most relevant of the topics for the post-Iraq landscape. Gowland-Debbas traces the evolution of the Rome Statute, from the International Law Commission's draft to the final version of the treaty, on the question of the institutional role of the Security Council, a political body, in the work of the ICC, a judicial one. She approvingly describes changes in the draft that minimized the formal role of the Security Council, arguing that political controls over the work of the ICC are undesirable as a matter of principle and unnecessary as a matter of practice. In addition to wagging an admonitory finger at the Assembly of States Parties to the Rome Statute about the remaining work on defining the crime of aggression, she criticizes proposals in which a finding by the Security Council might be necessary as a condition precedent to the ICC's exercise of jurisdiction over this crime.

The approach of this essay is emblematic of much legal scholarship on international dispute settlement. One of the fundamental attributes of an adjudicatory process is the degree of independence of the decision maker. Legal analysis often tends toward a normative judgment that equates impartiality and independence with greater institutional efficacy and higher-quality outcomes. Like many of the authors in this book and much of the extant legal scholarship, Gowland-Debbas takes this assumption as given, without attempting to prove its veracity or even examining it critically. But intergovernmental organizations (IGOs) by their very nature are political institutions, governed by law at the perimeter of their functions but nonetheless fundamentally concerned with reconciling often competing national policy imperatives.

States can be expected to be innately skeptical of decision-making mechanisms not under their direct control. There is consequently an inherently high threshold for the creation of a truly independent judicial mechanism as a component of the core functions of an IGO, and opportunities for political intervention into judicial processes, such as those described by Gowland-Debbas, ought to come as no surprise. While it is perhaps instinctive for lawyers to view political intrusions into adjudicatory functions as intrinsically suspect, in the fluid and dynamic setting of international relations, intuitions about the relationship between form and function can be misleading. Given the function of the ICC, the desirability of a courtlike model appears reasonably obvious. Nevertheless,

the absence of political checks may well have contributed to a very costly consequence in the form of the United States' apparently complete abandonment of the institution. This tension between the political and judicial functions of international institutions is the central, if largely unstated, theme of this collection.

Much international legal scholarship assumes that impartial dispute-settlement processes in which the adjudicators are independent experts appointed in their personal capacities are the top-of-the-line option. It is crucial, however, to frame such a treatment within a broader context. A serious student of international institutions rapidly discovers that organs of international institutions performing functions that appear to be adjudicatory in nature fall on a continuum with respect to institutional independence. Understandably for a work of modest length with a primarily legal perspective, *International Organizations and International Dispute Settlement* focuses on the portion of the spectrum that most closely resembles formal, binding, third-party processes in which the decision makers are neutral and independent—the international analogue of courts. With a broader perspective, the situation grows more complex, and crisp distinctions blur. Often the notion of adjudication may itself be unattractive to states, leading to institutions, organs, and processes whose purpose is not to decide disputes, but to facilitate observance of international norms. Recent trends in international legal scholarship addressing problems of compliance and effectiveness have begun to catch up with the reality of state behavior in IGOs, in which independent courtlike mechanisms play only one part, and not necessarily a large one.

Formal dispute settlement has limitations, most notably a reluctance of states to invigorate adjudicatory processes that may well be applied to their own detriment on another occasion. Wary of the binding force of third-party mechanisms, states may underutilize them. Nor is formal dispute settlement necessarily responsive to many real-world needs involving multilateral challenges that do not come in the shape of classic disputes. Less crisply legal, and perhaps more political, review processes are not necessarily a distant second best to formal, impartial dispute settlement. The question is one of appropriateness to the task from a functional point of view. While a higher component of independence may very well be desirable most of the time, independence is but one of a number of attributes characterizing an international institution and contributing to an optimal mix from the point of view of effectiveness.

Steve Charnovitz analyzes one such institution, the dispute settlement process of the World Trade Organization (WTO). He describes the tension between the courtlike Appellate Body and the Dispute Settlement Body, consisting of representatives of WTO member states, and convincingly argues that the structural rules governing the relationship between them tends to weigh in favor of independence. Indeed, one of the principal innovations in the Uruguay Round of trade negotiations was to encourage an approach to dispute settlement characterized more by respect for the rule of law and less susceptible to political factors. Somewhat ironically, nearly a decade after the creation of the WTO, the pendulum has swung in the opposite direction, with scholarly questioning of the legalization of institutions such as the WTO dispute settlement process, which was originally conceived as a conciliatory function.[1]

In an anecdote that demonstrates how difficult it is for international institutions to establish themselves as genuinely independent, Charnovitz relates the largely unreported history of Canada's challenge to France's ban on the importation of asbestos and asbestos-containing products.[2] After the Appellate Body indicated its intention to accept submissions from nonstate actors such as nongovernmental organizations, professional societies, and corporations—in a posture roughly analogous to that of amicus curiae briefs in domestic tribunals—the General Council, the WTO's plenary body, in effect overruled the Appellate Body, an institution with attributes closer to a judicial organ, before it rendered a final decision. This episode raises serious and troubling questions not only concerning judicial independence, but also concerning both the appropriate roles of the organization's principal organs and the interaction among them—the international equivalent of separation of powers—and the minimum procedural guarantees afforded in a judicial setting—the international equivalent of due process.[3]

[1] *See, e.g.*, Anne-Marie Slaughter, Andrew S. Tulumello, & Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AJIL 367 (1998).

[2] Appellate Body Report, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R (discussed in case report at 96 AJIL 435 (2002)).

[3] Very similar questions have recently arisen in the context of Chapter 11 of the North American Free Trade Agreement—the investment provisions of that treaty. For example, Sir Robert Jennings, former president of the International Court of Justice, writing in an expert capacity on behalf of a party in an investor-state

Accepting Charnovitz's implied invitation, Christine Chinkin (of the London School of Economics) and Ruth Mackenzie undertake a thorough survey of amicus practice in a variety of international institutional settings. Mackenzie is affiliated with the London-based Foundation for International Environmental Law and Development, an organization that has represented nonstate entities in the asbestos dispute and other WTO dispute settlement proceedings. These authors identify an underappreciated potential for IGOs to serve as "friends of the court" in international dispute settlement. While this suggestion is a reasonable one, the essay largely overlooks significant constraints facing IGOs in such a posture. In developing their position, Chinkin and Mackenzie touch briefly on the limited prior practice that there is (for example, in the Organization of American States and the International Civil Aviation Organization), but many questions remain unanswered.

Most obviously, what organ of the institution speaks on behalf of the organization in an amicus capacity? Does the secretariat of an international institution have the authority independently to speak on behalf of the IGO, or must the professional staff of the institution seek approval of the member states? Presumably, the answer to this question depends, at least to some extent, on the constitutive instrument of the organization, implying that an institution-specific analysis would be required. Because the states party to the underlying dispute may also be members of the IGO considering an amicus submission, the disputing parties could well be in a position to influence the content of the IGO's participation as a "friend of the court." Is that appropriate? If not, how would potential conflicts of interests be addressed? And what if only one side of the dispute is represented in the IGO? These are but some of the issues, both principled and practical, that may account for the existence of so few instances in which IGOs have actually taken advantage of the opportunity to be heard in an amicus capacity.

Andrés Rigo Sureda, former deputy general counsel at the World Bank, addresses the theme of independence from a different perspective in analyzing the Bank's Inspection Panel and analogous mechanisms at the regional development banks. The Inspection Panel does not easily fit the mold of formal, binding, third-party dispute settlement. At least in theory, the functions of the panel—the first institution to engage in something approaching external review of the performance of an IGO—are investigatory and not adjudicatory. Although the decision makers (the three members of the panel) are independent personalities, the Bank's Board of Executive Directors is a political organ that retains the power to terminate the process at an interim juncture. The panel, moreover, receives legal advice from the Bank's management, the same entity whose performance is subject to scrutiny by the panel. Rigo Sureda describes with reasonable candor the tug of war between the panel and management over the panel's independence, a story largely untold in the existing literature. Generalized beyond the confines of the specific situation it examines, this contribution teaches that independence is neither absolute nor entirely a product of structural features, but, rather, an attribute that new international institutions such as the Inspection Panel must fight to establish early in their existence, if at all.

Nongovernmental input into WTO dispute settlement and the World Bank Inspection Panel are representative of another important trend that pervades this volume, but that is not addressed on its own terms: the increasing creation of entry points for nonstate actors into the work of international institutions. This trend represents a major innovation in public international law, which typically is confined to articulating a flow of rights and obligations among states and acknowledges no role for corporations, private nonprofit organizations, or individuals—none of which are subjects of international law. For example, the North American Agreement on Environmental Cooperation (NAAEC),[4] the environmental "side agreement" to the North American Free Trade Agreement (NAFTA), creates a mechanism that can be initiated by private parties from any of the three party states to challenge ineffective enforcement of domestic law. The Secretariat of the Commission for Environmental Cooperation (CEC), the trilateral institution established by the NAAEC, is charged with preparing a "factual record" in response to citizen submissions. The history of this process, in which the NAFTA governments must approve the subsequent preparation of a factual record at a decision point midway through the full

dispute, has criticized the NAFTA parties for a "legislative" intervention apparently intended to apply to pending disputes. *See* [Methanex's First Submission Concerning the NAFTA Free Trade Commission's July 31, 2001, Interpretation], attachment (Sept. 18, 2001), Methanex Corp. v. United States (NAFTA Ch. 11 Arb. Trib. Aug. 7, 2002) (Second Opinion of Robert Y. Jennings), *at* <http://www.international-economic-law.org/Methanex/>.

[4] 32 ILM 1480 (1993).

process anticipated by the agreement, has been remarkably similar to that of the World Bank's Inspection Panel. Like the panel, the CEC's secretariat has been engaged in an ongoing struggle with its governmental masters to establish its independence, credibility, and effectiveness as an institution.[5]

In a manner that parallels the subject matter it addresses, *International Organizations and International Dispute Settlement* communicates both the excitement of cutting-edge developments and the frustrations resulting from the constraints imposed by existing doctrine. In the latter category, Tullio Treves and Christian Dominicé address the role of IGOs in, respectively, contentious cases and advisory opinions in the International Court of Justice (ICJ). Treves, a judge on the International Tribunal for the Law of the Sea, analyzes selected aspects of the extension of the Tribunal's extension of jurisdiction to include IGOs as potential parties to contentious cases—a departure from the ICJ's limitation to states. Dominicé, in turn, acknowledges that the Court's advisory opinion jurisdiction is a partial, although imperfect, response to the need identified by Treves. Building on these authors' work, Anne-Marie La Rosa identifies an apparent anomaly in which the Constitution of the International Labour Organization (ILO) purports to create jurisdiction in the ICJ over a class of cases that might be precluded by the Statute of the Court because the ILO, an international organization, would be the respondent.

Laurence Boisson de Chazournes touches on similar themes in a chapter in which she argues that the ICJ, through its advisory opinion jurisdiction, has taken on "many global policy issues . . . [in] a quest for a legal answer to public policy concerns" (p. 109). In what amounts to a call for judicial activism, she then articulates how greater transparency and openness might enhance the perception of the legitimacy of the Court's pronouncements. The ICJ's advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*[6] probably comes closest to the ideal she espouses. Using that opinion as an example, one might well ask, however, whether such an approach would enhance or erode the stature of the Court. While the Court's opinion makes interesting reading as an attempt to nudge the law in positive directions against a background of practical constraints, it is not at all apparent that the ICJ's pronouncement, bold though it may be, will have any effect on the real world of arms control.[7]

Taking Dominicé's and Boisson de Chazournes's analyses of the potential uses of ICJ advisory opinions one step further, it would be illuminating to examine the limits of the Court's advisory opinion jurisdiction when a request from an IGO also engages questions of the rights and obligations of particular states, as is not infrequently the case. In such settings, the line between the subject matter that might be addressed through an advisory opinion and the subject matter amenable to treatment as a contentious case could be unclear, with the states whose interests are affected objecting to what might be perceived as an abuse of IGOs' unique prerogative to request an advisory opinion from the ICJ.

Chapters on the role of the European Union (EU) by Allan Rosas and Andrew Clapham fit rather uncomfortably within the broader structural design of the book. This question of fit has nothing to do with the quality of the authors' contributions, which are quite informative, but with the unique status of the EU. A supranational organization that exercises some functions traditionally understood to be the prerogative of sovereign states, the EU has a much more highly developed internal legal structure than most intergovernmental organizations. By comparison with the EU, which has much the character of an international government, other IGOs such as the United Nations are more akin to forums for resolving collective-action problems, ordinarily on a consensus basis. Similarly, in its external relations the EU enjoys the use of international legal mechanisms, such as special provisions allowing it to become party to multilateral treaties, that are different in kind from those characteristic of most IGOs. Analyses of the EU's situation, both internal and external, on issues such as those addressed by the present work, may be of interest in their own right, but generalizations that might apply to other IGOs are few. As applied to the EU, the subject matter of the present volume is enormously complex; a thorough treatment of the EU by reference to the internal and external aspects of

[5] *See, e.g.*, GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION (David L. Markell & John H. Knox eds., 2003).

[6] 1996 ICJ REP. 226 (July 8).

[7] *See, e.g.*, Michael J. Matheson, *The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons*, 91 AJIL 417, 435 (1997) (analysis by principal deputy legal adviser of U.S. Department of State concluding that "whether the Court's opinion will hasten the day when nuclear weapons are eliminated, . . . it was never reasonable to think that the Court could do so").

international dispute settlement would be worthy of a book-length treatment in its own right. That said, Clapham's chapter on the application of the jurisprudence of the European Court of Human Rights to the EU teaches how international tribunals such as the ECHR can creatively overcome formal limitations on their jurisdiction, which does not include the EU.

Like many multiple-author volumes, *International Organizations and International Dispute Settlement* might have benefited from a somewhat firmer editorial hand to assure that the individual contributions fit into a broader architecture that leaves the reader with a clear message. But perhaps this limitation is only an artifact of the subject matter, itself in transition. Both now and as international cooperation continues to evolve—as it inevitably will, even in what has become a less than congenial climate—*International Organizations and International Dispute Settlement* will serve the important function of documenting current developments at the turn of the millennium.

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Human Rights as Politics and Idolatry. By Michael Ignatieff. Princeton NJ: Princeton University Press, 2002. Pp. xxvii, 176. Index. $35, cloth; $12.95, paper.

This book consists of two short essays by Michael Ignatieff, director of the Carr Center for Human Rights Policy at Harvard University, accompanied by commentaries by Amy Gutmann (who has also written the introduction), Anthony Appiah, David Hollinger, Thomas Laqueur, and Diane Orentlicher. The essays are thoughtful and provocative, and there is much here that deserves wider discussion within the human rights movement and, indeed, among international lawyers generally.

While closely related, Ignatieff's essays, "Human Rights as Politics" and "Human Rights as Idolatry," focus on different themes. In the first piece, Ignatieff challenges the notion that "human rights is above politics, a set of moral trump cards whose function is to bring political disputes to closure and conclusion" (p. 21). In addressing the limits of human rights (Ignatieff uses the term loosely, but it appears that his challenges are directed at both human rights lawyers and nonlawyer activists), Ignatieff explores the changing relationship between human rights and sovereignty. He suggests that too great an emphasis on human rights broadly defined may lead to instability and, perversely, to greater violations of human rights in the short and medium term. He observes that "stable states" are "the most important protector of human rights" (p. 23), and it would be difficult to argue that instability and resulting wars in the Balkans, the Great Lakes region of Africa, and the southern tier of the former Soviet Union (all cited by Ignatieff) have not led to gross violations of human rights and humanitarian law.

While gross violations of human rights are often themselves sources of instability, Ignatieff suggests that forceful intervention to protect human rights is actually undermining the legitimacy of human rights, "both because our interventions are unsuccessful and because they are inconsistent" (p. 39). Offering the Kosovo Liberation Army as an example, he notes that intervention may reward violence—although no such argument stopped the Independent International Commission on Kosovo (of which Ignatieff was a member) from concluding that the NATO bombing was "illegal, yet legitimate."[1] Ignatieff's brief discussion of "humanitarian" intervention adds nothing new to the debate, but it does highlight the conflicts between human rights ends and means.

In a theme to which he returns in the second essay, Ignatieff emphasizes the importance of constitutionalism—as opposed to the simplistic imperative of electoral democracy—in the protection of human rights. "[T]he chief threat to human rights comes not from tyranny alone, but from civil war and anarchy. Hence, . . . the liberties of citizens are better protected by their own institutions than by the well-meaning interventions of outsiders" (p. 35).[2] Ignatieff echoes John Rawls's call for acceptance of less-than-democratic states as preferable to an insistence on new, often untenable, forms of the liberal democracy generally espoused by outsiders,[3] although he at times confuses the

[1] INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 186 (2000).

[2] One example of such a "well-meaning intervention" might be the strident opposition of mainstream human rights groups to adoption of the quasi-traditional process of *gacaca* to deal with the more than 100,000 persons still imprisoned in Rwanda for their alleged participation in the 1994 genocide. While *gacaca* certainly falls far short of international "fair trial" standards, insistence on the latter could result only in much more serious violations of the rights of those accused who would remain in prison indefinitely, absent any alternative means of determining their guilt or innocence.

[3] Rawls refers to such societies as "nonliberal" or "decent hierarchical" peoples. *See generally* JOHN RAWLS, THE LAW OF PEOPLES 59–88 (1999).